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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CODY ESCOVEDO,

Respondent,

v.

LAURA ROBITSCHEK,

Appellant.

F066271

(Fresno Super. Ct.
No. 12CEFL06070)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Adolfo M. Corona, Judge.

Laura Robitschek, in pro. per., for Appellant.

Cody Escovedo, in pro. per, for Respondent.

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FACTS

On April 7, 2011, respondent Cody Escovedo obtained a restraining order against appellant Laura Robitschek. By its terms, the order was to remain in effect until

[*] Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

midnight on October 7, 2011. On October 17, 2012, respondent filed another request for a restraining order. In the request, respondent averred under oath that Appellant "has use[d] weapon and gun threats in the past." Respondent attached letters dated October 21, 2011, and May 23, 2012, to his request for a restraining order. The letters contain appellant's typewritten name at the bottom, but no signature.[1] Respondent also attached a letter he wrote to appellant. In the letter, respondent alleges that appellant made charges to credit cards in respondent's name without permission.

Appellant filed a response, contending that respondent's claims lacked specificity. Appellant also claimed that respondent's allegations of prior abuse "do not meet the requirements of assault."

The court held a hearing on the restraining order request. Both appellant and respondent were sworn and offered testimony. At one point, the court asked respondent what type of mail he received from appellant. One of the pieces of mail respondent identified were holiday cards addressed to respondent's son.

The reporter's transcript of the testimony contains 12 pages. The following notation appears on the final page: "(WHEREUPON, WHEN COURT TAKES BRIEF RECESS, THIS COURT REPORTER IS SENT TO A DIFFERENT DEPARTMENT WAS NOT PRESENT TO REPORT THE REMAINDER OF THE HEARING.)"[2]

The court granted the restraining order. The minute order states: "The Court finds good cause to grant a 1 year restraining order[.] [T]he writing only gives the Court good reason to grant the restraining order. The Court notes the respondent [Appellant Laura Robitschek] left the Courtroom while the Court was giving its ruling."

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[1] At the hearing, appellant admitted to writing the October 11, 2011, letter. The record does not show whether appellant admitted or was asked about authorship of the May 23, 2012, letter.

[2] In his appellate brief, respondent contends the "bulk" of the testimony at the hearing occurred after the end of the transcript.

Among other requirements, the restraining order commands appellant to stay at least 100 yards away from respondent and his immediate family members. The order also prohibits appellant from owning, possessing, having, buying, trying to buy, receiving, or trying to receive firearms. It requires that appellant sell or turn in any firearms she possesses within 24 hours of being served with the order.

Appellant appeals from the restraining order.

ARGUMENT

I. APPELLANT HAS FAILED TO PROVIDE AN ADEQUATE RECORD TO REVIEW HER CLAIMS OF ERROR

We are unable to review appellant's contentions on the record before us. As noted, the trial court took testimony from both parties at the restraining order hearing. Yet, only a portion of that testimony is in the appellate record.

"Appellant[']s[] proper remedy, upon learning of the unavailability of portions of the transcript, was to obtain a settled statement of the oral proceedings prepared by the parties and settled by the judge who heard the matter, or an agreed statement prepared by the parties and consisting of a condensed statement of the relevant proceedings. [Citations.] Appellant[] failed to utilize either procedure and [has] provided this court with a record which is wholly inadequate to enable it to review the error[s] complained of." (*Ehman v. Moore* (1963) 221 Cal.App.2d 460, 462-463; see also, Cal. Rules of Court, rules 8.130(g), 8.134, 8.137.)

A. WE CANNOT EVALUATE APPELLANT'S CLAIM THE DVPA IS "VOID FOR VAGUENESS"

This defect in the record precludes our review of appellant's argument that the Domestic Violence Protection Act (DVPA) is "void for vagueness." When a party contends a law in unconstitutionally vague, the court examines the party's actual conduct before analyzing other hypothetical applications of the law. (See *Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-495.) This is true even when the

court analyzes a facial challenge to the law on vagueness grounds. (See *ibid*.) We do not have a complete record of appellant's conduct forming the basis for the restraining order. Therefore, due to the inadequacy of the record, we cannot "examine the complainant's conduct before analyzing other hypothetical applications of the law." (*Ibid*.)

B. WE CANNOT EVALUATE APPELLANT'S FIRST AMENDMENT CLAIM

Appellant also contends the court violated her First Amendment rights.[3] She posits that "[t]o base a permanent restraining order on the inter[-]family sending of holiday cards is too broad of discretion and not in line with the spirit of the 'Act'."

This contention assumes the restraining order was based merely on the holiday cards appellant sent to her family. Respondent challenges this assertion, claiming "[t]he court[']s findings were not based on 'holiday and birthday cards ….' " He submits "[t]he lack of transcripts [*sic*] makes it impossible to refer back to what took place in the courtroom, *which contains all of the details of harassment and admissions from Appellant*." (Italics added.) Again, we cannot resolve this particular dispute, or determine the veracity of the parties' competing claims on the incomplete record before us.[4]

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[3] Appellant uses the phrase "prior restraint" to describe her argument that the DVPA defines "abuse" to include protected speech. She does not, as the phrase "prior restraint" might suggest, contend that the restraining order's provisions impermissibly burden her First Amendment rights. Rather she argues that the DVPA improperly allows a finding of "abuse" based on protected speech.

[4] The court's minute order granting the restraining order is of little help on this issue. The minute order's discussion of the basis for the restraining order is brief. It reads: "The Court finds good cause to grant a 1 year restraining order the writing only gives the Court good reason to grant the restraining order." The construction of this sentence is unusual and its meaning is unclear. Moreover, the order does not indicate what is meant by the phrase "the writing." We do note there were several ostensible "writings" referenced during the transcribed portion of the hearing. At the hearing, the court noted that Respondent's request for a restraining order alleged that appellant "used to send … harassing letters … and e-mails, including threats." Cards sent by appellant

C. WE CANNOT EVALUATE APPELLANT'S SECOND AMENDMENT CLAIM

Appellant next submits that the restraining order and its resultant effect on her ability to possess firearms (see Fam. Code,[5] § 6389, subd. (a)) violates the Second Amendment. We understand appellant's contention to be an "as-applied" challenge.[6] Again, the inadequate appellate record precludes review of this contention.

An "as applied" challenge "*contemplates analysis of the facts of a particular case* … to determine the circumstances in which the statute or ordinance has been applied and to consider whether *in those particular circumstances* the application deprived the individual to whom it was applied of a protected right. [Citations.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084, italics added.) Thus, when the record provides insufficient facts, we cannot evaluate an as-applied challenge. (See *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882, 888, disapproved on other grounds by *People v. Superior Court (Lucero)* (1989) 49 Cal.3d 14, 28, fn. 10 [record contained no evidence to consider appellant's factual assertions, therefore review of as-applied

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were also mentioned at the hearing. A letter dated October 21, 2011, was also discussed. Additional writings may have been discussed during the unrecorded portion of the hearing. If we had the benefit of reviewing the court's oral explanation of the ruling, this confusion would likely be remedied.

But even if the court had based its decision solely on the fact appellant sent "holiday" cards to respondent's son (which we find unlikely), we would not reverse. " 'We uphold [orders] if they are correct for any reason, "regardless of the correctness of the grounds upon which the court reached its conclusion…" ' " (*Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1770.) There may well have been testimony adduced during the unreported portion of the hearing that independently supports the trial court's order. Because we indulge assumptions in support of the order on appeal, we must assume that such testimony was in fact given here.

[5] All further statutory references are to the Family Code unless otherwise stated.

[6] Even if appellant endeavored to present a facial challenge, it is not supported by adequate analysis. "We may disregard constitutional claims unsupported by adequate analysis. [Citations.]" (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 454.)

challenge was foreclosed].) Therefore, we decline to consider appellant's as-applied challenge "upon a record which affords inadequate factual basis for determining whether … as applied … the statute would violate [appellant's constitutional rights]." (*Alabama State Federation of Labor v. McAdory* (1945) 325 U.S. 450, 463.)[7]

CONCLUSION

" '[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' [Citations.]" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

DISPOSITION

The restraining order is affirmed. Costs are awarded to Respondent.

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[7] Whether the DVPA comports with due process and the Second Amendment may need to be addressed in an appropriate case.

The DVPA empowers courts to issue restraining orders upon "reasonable proof of a past act or acts of abuse." (§ 6300.) A person subject to certain restraining orders issued under the DVPA are automatically prohibited from owning, possessing, purchasing or receiving firearms or ammunition while the protective order is in effect. (§ 6389.) This would include restraining orders imposed upon "reasonable proof" (§ 6300) a person has merely made repeated telephone calls with intent to annoy even if no conversation ensued from the call. (§§ 6203, subd. (d), 6320, subd. (a), Pen. Code § 653m, subd. (b).)

Moreover, a person seeking a protective order under the DVPA bears the burden of establishing his or her case by a mere "preponderance of the evidence." (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138.) Whether due process and the Second Amendment permit the government to completely prohibit firearm possession based on facts established by a preponderance of the evidence is a question we will not answer today. (But, cf. *People v. Jason K.* (2010) 188 Cal.App.4th 1545, 1554-1559.)